Gobind Singh Deo v Yang Dipertua, Dewan Rakyat & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R3–24–17 OF 2009
MOHAMAD ARIFF YUSOF JC
22 OCTOBER 2009

Constitutional Law — Constitution — Federal Constitution — Doctrine of the separation of powers — Whether doctrine of separation of powers a feature of the Malaysian Constitution

Constitutional Law — Constitution — Supremacy of Constitution — Whether constitutional supremacy as opposed to Parliamentary supremacy the fundamental constitutional principle in Malaysia

Constitutional Law — Legislature — Contempt — Power of the Legislature to suspend Member of Parliament for contempt — Whether power derived from common law — Whether power based on power of the British House of Commons — Whether proceedings of the Legislature relating to a Member's suspension for contempt immune from judicial review or challenge — Federal Constitution art 63(1)

Constitutional Law — Legislature — Privileges of — Proceedings in Legislature — When such proceedings open to judicial scrutiny and/or correction — Whether all proceedings of the Legislature open to judicial scrutiny and/or correction — Whether ratio decidendi in YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener) [2009] 4 MLJ 24 limited in scope

Constitutional Law — Legislature — Privileges, immunities and powers of — Privileges, immunities and powers of the British House of Commons — Circumstances when applicable to Malaysia — Houses of Parliament (Privileges and Powers) Act 1952 ss 32 & 33

Constitutional Law — Legislature — Remuneration of Members of Parliament — Whether Legislature empowered to withhold allowances and entitlements of suspended Member

Constitutional Law — Legislature — Scope of legislative power — Whether Legislature empowered to withhold allowances and entitlements of suspended

Member of Parliament — Whether Legislature's resolution to withhold suspended Member's allowances and entitlements open to judicial scrutiny and/or challenge

Constitutional Law — Parliament — Parliamentary systems — Malaysian Parliamentary system — Whether modeled after the British Parliamentary or Westminster system — Whether general principles and usages of the Westminster system relevant to Malaysia — Circumstances when such principles and usages applicable

English Law — Constitutional law — Privileges, immunities and powers of the Legislature — Privileges, immunities and powers of the British House of Commons — Circumstances when applicable to Malaysia — Houses of Parliament (Privileges and Powers) Act 1952, ss 32 & 33

The plaintiff, the Member of Parliament for Puchong stood accused of uttering statements allegedly serious in nature, and in violation of the rights and privileges of a Member of Parliament and in contempt of the Dewan Rakyat ('the House'). On a motion tabled by the second defendant, the House resolved to suspend the plaintiff for 12 months and to withhold the payment of all remuneration and allowances due and accruing to the plaintiff over the same period. The plaintiff sought declarations from the High Court, inter alia, to the effect that the plaintiff's suspension was null and void and of no effect, and that he was entitled to his remuneration and allowances. The primary issue before the High Court concerned the justiciability of proceedings in the Dewan Rakyat.

Held, allowing the plaintiff's application in part with no order as to costs:

(1) The doctrine of the separation of powers is a feature of the Malaysian Constitution. The separation of powers, in the sense of checks and balances within the three branches of Government exists and animates the Malaysian Constitution. Article 63(1) of the Federal Constitution ('Constitution') is an instance of the application of such doctrine (see para 10). *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1 (FC) (followed); *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 (referred).

(2) In *YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener)* [2009] 4 MLJ 24 (FC) ('*Zambry*'s case'), the Federal Court merely recognised the overriding power of the courts to determine whether there was any legal basis for the Perak State Assembly to suspend a State Assemblyman in respect of an alleged contempt committed outside the State Legislative Assembly, when there was no provision under the Perak State Constitution, the Standing Orders of the Legislative Assembly or the

Perak Legislative Assembly (Privileges) Enactment 1959. In view of the context of the case, the ratio decidendi in *Zambry*'s case was limited. *Zambry*'s case ought not to be read as laying down the broadest possible proposition that all acts of a State Legislative Assembly or the Houses of Parliament must be open to judicial scrutiny and correction. To extend the ratio in such a broad manner would render meaningless the phraseology of arts 63(1) and 72(1) of the Constitution (see para 17) *YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener)* [2009] 4 MLJ 24 (FC) (followed).

(3) If the proceedings in the House have constitutional or legal support, the proceedings must be immune from legal challenge. If such proceedings do not have such validation, the proceedings can be challenged. The court when called to adjudicate such a dispute can enquire whether a particular privilege or power of the House exists and test its legality. If the privilege or power exists, the court cannot question such privilege or power. This view is consonant with the common law position (see para 17).

(4) In Malaysia although the fundamental constitutional principle is Constitutional supremacy and not Parliamentary supremacy, since the Malaysian parliamentary system is modeled after the Westminster system, the general principles and usages of Westminster are not entirely irrelevant to resolve ambiguities except where the Federal Constitution, State Constitutions, or local laws prohibit reliance upon such principles and usages. The first point of reference must be the Malaysian Constitution or Malaysian law, as was done in *Zambry*'s case (see para 23).

(5) The only direct express provision on contempt of the House is s 9 of the Houses of Parliament (Privileges and Powers) Act 1952 ('the 1952 Act'), which provides the House with a summary power to punish for contempt but is silent on the punishment of suspension or the withholding of allowances and other entitlements. However, the power to suspend and to expel exists at common law. Pursuant to ss 32 and 33 of the 1952 Act the privileges, immunities and powers of the Houses of Parliament are enlarged by incorporating the like privileges, immunities and powers of the House of Commons enjoyed at the commencement of the 1952 Act (see paras 25–26 & 28).

(6) In the instant case, the plaintiff's conduct fell within the definition of contempt under s 9 of the 1952 Act and also under common law. Thus, by virtue of ss 32 and 33, the plaintiff's conduct would also constitute contempt of the House and punishable as such — the punishment of suspension, or even expulsion, being well-established at common law. Therefore the proceedings of the House concerning the plaintiff's

conduct and the 12 month suspension had legal basis and were immune from judicial review or challenge by operation of art 63(1) of the Constitution (see para 30).

(7) However, there was no express Malaysian provision, or House of Common's power existing at the date of the 1952 Act to withhold the allowances and entitlements of a Member of Parliament. There was therefore no legal basis to withhold the plaintiff's allowances and entitlements and such decision was open to challenge. The Constitutional protection for Members of Parliament under art 64 of the Federal Constitution — which requires Parliament to provide by law for the remuneration of Members — could not be displaced in the absence of clear law allowing the withholding of a Member's remuneration and entitlements (see para 30). *Datuk Ong Kee Hui v Sinyium Anak Mutit* [1983] 1 MLJ 36 (FC) (followed).

(8) Standing Order 43(3) which sets out the procedure on the suspension of a Member constituted a provision of form relating to proceedings of the House, is immune from judicial review as long as the power to punish for contempt of the particular offence exists (see paras 32 & 35).

[Bahasa Malaysia summary

Plaintif, Ahli Parlimen Puchong dituduh melafazkan kenyataan yang didakwa bersifat serius, dan bertentangan dengan hak-hak dan keistimewaan ahli parlimen dan menghina Dewan Rakyat ('Dewan'). Atas satu usul yang dikemukakan oleh defendan kedua, Dewan memutuskan untuk menggantung plaintif selama 12 bulan dan menahan bayaran kesemua ganjaran dan elaun-elaun yang perlu dibayar dan terakru kepada plaintif dalam masa tersebut. Plaintif memohon deklarasi daripada Mahkamah Tinggi, antara lain, bahawa penggantungan plaintif adalah batal dan tidak sah dan tidak mempunyai kesan, dan dia berhak terhadap ganjaran dan elaun-elaunnya. Isu utama di hadapan Mahkamah Tinggi adalah berkaitan keadilan prosiding di Dewan Rakyat.

Diputuskan, membenarkan sebahagian permohonan plaintif tanpa perintah untuk kos:

(1) Doktrin pembahagian kuasa adalah salah satu ciri Perlembagaan Malaysia. Pembahagian kuasa, bersifat kawalan dan pengimbangan di antara tiga cabang Kerajaan wujud dan merangsang Perlembagaan Malaysia. Perkara 63(1) Perlembagaan Persekutuan ('Perlembagaan') adalah salah satu contoh pengaplikasian doktrin tersebut (lihat perenggan 10). *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1 (MP) (diikut); *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 (dirujuk).

(2) Di dalam kes *YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener)* [2009] 4 MLJ 24 (MP) ('kes *Zambry*'), Mahkamah Persekutuan hanya mengakui kuasa utama mahkamah untuk memutuskan sama ada terdapat asas undang-undang untuk Dewan Negeri Perak menggantung Ahli Dewan Negeri berhubungan dengan satu penghinaan yang didakwa dilakukan di luar Dewan Perundangan Negeri, apabila tidak ada peruntukan di bawah Perlembagaan Negeri Perak, Perturan-Peraturan Majlis Perundangan atau Enakmen Majlis Perundangan Negeri Perak (Keistimewaan-Keistimewaan) 1959. Berpandukan konteks kes ini, ratio decidendi di dalam kes *Zambry* adalah terhad. Kes *Zambry* tidak boleh dibaca sebagai menetapkan saranan yang seluas mungkin bahawa kesemua tindakan Majlis Perundangan Negeri atau Majlis Parlimen mesti terbuka kepada penelitian dan pembetulan oleh kehakiman. Untuk memperluaskan ratio tersebut secara yang luas begitu akan menyebabkan penyusunan rangkai kata perkara 63(1) dan 72(1) Perlembagaan sebagai tidak bermakna (lihat perenggan 17). *YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener)* [2009] 4 MLJ 24 (MP) (diikut).

(3) Jika prosiding di Dewan tersebut mempunyai sokongan perlembagaan atau undang-undang, prosiding tersebut harus kebal daripada dicabar dari segi undang-undang. Jika prosiding tersebut tidak mempunyai kesahan sedemikian, prosiding tersebut boleh dicabar. Mahkamah, apabila dipanggil untuk memutuskan pertikaian yang sebegitu boleh mempersoalkan sama ada keistimewaan atau kuasa tertentu Dewan wujud dan menguji kesahannya. Jika keistimewaan atau kuasa wujud, mahkamah tidak boleh mempersoalkan keistimewaan atau kuasa tersebut. Pandangan ini sejajar dengan kedudukan *common law* (lihat perenggan 17).

(4) Di Malaysia walaupun prinsip asas perlembagaan adalah keulungan Perlembagaan dan bukan keulungan Parlimen, oleh sebab sistem parlimen Malaysia mengikut sistem Westminster, prinsip am dan penggunaan Westminster bukan keseluruhannya tidak relevan untuk menyelesaikan keraguan kecuali di mana Perlembagaan, Perlembagaan Negeri atau undang-undang tempatan menghalang sandaran atau prinsip tersebut dan penggunaannya. Rujukan utama semestinya kepada Perlembagaan Malaysia atau undang-undang Malaysia, seperti yang dibuat di dalam kes *Zambry* (lihat perenggan 23).

(5) Satu-satunya peruntukan langsung berkaitan penghinaan Dewan adalah s 9 Akta Majlis Parlimen (Keistimewaan dan Kuasa) 1952 ('Akta 1952'), yang memperuntukkan Dewan dengan kuasa untuk menghukum bagi penghinaan tetapi tidak ada hukuman

penggantungan atau penahanan elaun-elaun atau ganjaran-ganjaran lain. Walau bagaimanapun, kuasa untuk menggantung dan membuang wujud dalam *common law*. Berikutan ss 32 dan 33 Akta 1952 keistimewaan, imuniti dan kuasa-kuasa Majlis Parlimen diperluaskan dengan memasukkan keistimewaan, imuniti dan kuasa-kuasa *House of Commons* yang digunakan semasa permulaan Akta 1952 (lihat perenggan 25–26 & 28).

(6) Di dalam kes ini, tindakan plaintif terangkum dalam definisi penghinaan di bawah s 9 Akta 1952 dan juga *common law*. Oleh itu berikutan ss 32 dan 33, tindakan plaintif akan juga bermaksud penghinaan Dewan dan boleh dihukum sebegitu—hukuman penggantungan, atau pemecatan, yang telah mantap dalam *common law*. Oleh itu prosiding Dewan berkaitan tindakan plaintif dan penggantungan 12 bulan mempunyai asas undang-undang dan imun daripada semakan cabaran atau kehakiman dengan operasi perkara 63(1) Perlembagaan (lihat perenggan 30).

(7) Walau bagaimanapun tidak ada langsung peruntukan Malaysia atau kuasa *House of Commons* pada tarikh Akta 1952 untuk menahan elaun-elaun dan ganjaran Ahli Parlimen. Oleh itu tiada asas dari segi undang-undang untuk menahan elaun-elaun dan ganjaran dan keputusan sedemikian boleh dipersoalkan. Perlindungan Perlembagaan Ahli Parlimen di bawah perkara 64 Perlembagaan — yang memerlukan Parlimen memperuntukkan undang-undang kecil untuk ganjaran Ahli-Ahli — tidak boleh digantikan dalam ketiadaan undang-undang yang jelas membenarkan penahanan elaun-elaun dan ganjaran ahli (lihat perenggan 30). *Datuk Ong Kee Hui v Sinyium Anak Mutit* [1983] 1 MLJ 36 (MP) (diikut).

(8) Aturan 43(3) yang menetapkan prosedur untuk penggantungan ahli menetapkan bentuk peruntukan berkaitan dengan prosiding Dewan, adalah imun daripada semakan kehakiman selagi kuasa untuk menghukum untuk penghinaan kesalahan tertentu wujud (lihat perenggan 32 & 35).]

Notes

For a case on contempt, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2215.

For a case on Supremacy of Constitution, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 1906.

For cases on English law, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2219–2398.

For cases on Federal Constitution, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1889–1893.

For cases on Legislature in general, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2209–2250.
For cases on Parliament in general, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2255–2259.
For cases on scope of legislative power, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2244–2248.

Cases referred to

Ah Thian v Government of Malaysia [1976] 2 MLJ 112, FC (refd)
Bradlaugh v Gossett (1884) 12 QBD 271, DC (folld)
Datuk Ong Kee Hui v Sinyium Anak Mutit [1983] 1 MLJ 36, FC (folld)
PP v Kok Wah Kuan [2008] 1 MLJ 1, FC (folld)
YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener) [2009] 4 MLJ 24, FC (folld)

Legislation referred to

Federal Constitution arts 8(1), 62(1), 63(1), 64, 72, 72(1)
House of Parliament (Privileges and Powers) Act 1952 ss 9, 23, 32, 32(1), 33
Laws of the Constitution of Perak art 63
Legislative Assembly (Privileges) Enactment 1959
Members of Parliament (Remuneration) Act 1980

Karpal Singh (Sangeet Kaur Deo and Sankaran Nair with him) (Karpal Singh & Co) for the plaintiff.
Azizah Nawawi (Amarjeet Singh with her) (Deputy Public Prosecutor, Attorney General's Chambers) for the defendants.

Mohamad Ariff Yusof JC:

INTRODUCTION

[1] On 12 March 2009, during a debate at the committee stage of the Supplementary Finance Bill 2009, the plaintiff in this action, who is the Member of Parliament for Puchong, uttered certain statements alleging that the then YAB Deputy Prime Minister, who in turn was and is the Member of Parliament for Pekan, was implicated in a murder case. Four days later, on 16 March 2009, the second defendant in this action, Datuk Seri Mohamad Nazri Abdul Aziz, the Minister in the Prime Minister's Department, tabled a motion on the matter which was debated by the House and passed accordingly as a proper resolution of the House. This motion was moved by the second defendant purportedly under Standing Order 27(3), and it read as follows:

> BAHAWA pada 12 Mac 2009, Yang Berhormat Tuan Gobind Singh Deo, Ahli Parlimen Kawasan Puchong semasa perbahasan peringkat Jawatankuasa Rang Undang-Undang Perbekalan Tambahan (2009) 2009 telah mengeluarkan

kenyataan-kenyataan yang mendakwa Yang Amat Berhormat Timbalan Perdana Menteri, Ahli Parlimen Kawasan Pekan terlibat dalam kes pembunuhan.

BAHAWA Yang Berhormat Ahli Parlimen Kawasan Puchong juga telah mengeluarkan kenyataan-kenyataan yang menghina Timbalan Yang di-Pertua Dewan Rakyat setelah diperintah keluar Dewan.

DAN BAHAWA kenyataan-kenyataan yang dibuat oleh Yang Berhormat Ahli Parlimen Puchong adalah merupakan satu dakwaan yang sangat serius dan menyalahi hak dan keistimewaan sebagai Ahli Parlimen serta merupakan penghinaan kepada Dewan ini.

MAKA INILAH DIPERSETUJUI BAHAWA Yang Berhormat Ahli Parlimen Kawasan Puchong hendaklah digantung tugas dari jawatannya sebagai Ahli Parlimen selama 12 bulan dari tarikh keputusan usul ini diluluskan. Dalam masa penggantungan ini Yang Berhormat Ahli Kawasan Puchong tidak akan dibayar kesemua bayaran elaun dan kemudahan sebagai seorang Ahli Parlimen.

[2] As can be seen from the contents of this motion, the plaintiff was alleged to have issued statements which were serious in nature and violated the rights and privileges of a Member of Parliament, as well as being a contempt of the House. The plaintiff was thereafter suspended, in the words of the motion, 'digantung tugas dari jawatannya sebagai Ahli Parlimen' from the date of passing the motion, and during this period of suspension the plaintiff shall not be paid all his allowances and entitlements as a Member of Parliament.

[3] By originating summons filed, the plaintiff has named as defendants the following parties, namely (1) the Honourable Speaker, Dewan Rakyat (2) Datuk Seri Mohamad Nazri Abdul Aziz, Minister in the Prime Minister's Department, (3) the Secretary, Dewan Rakyat and (4) the Government of Malaysia. In terms of the relief prayed, the plaintiff claims against the defendants, jointly and separately, the following:

(a) a declaration that the plaintiff's suspension as a Member of Parliament by the first defendant pursuant to motion moved by the second defendant on 16 March 2009 and adopted by the Dewan Rakyat is null and void and of no effect;

(b) a declaration that the letter dated 18 March 2009 under the hand of the third defendant is null and void and of no effect. Alternatively, the orders adverted to in the said letter are unenforceable in law;

(c) a declaration that the plaintiff is entitled to remuneration and other benefits constitutionally granted to him under art 64 of the Federal Constitution pursuant to Members of Parliament (Remuneration) Act 1980 (Act 237);

(d) a declaration that the proceedings and a decision taken in the Dewan Rakyat culminating in the suspension of the plaintiff on 16 March 2009 are not immune from scrutiny by this honourable court;

(e) a declaration that the suspension of the plaintiff on 16th to March 2nd 2009 by the Dewan Rakyat is unconstitutional in that it contravenes the equality provisions of art 8(1) of the Federal Constitution;

(f) an order that an account be taken of all allowances, emoluments and other benefits the plaintiff is entitled to and that the same be paid to him forthwith;

(g) an order that the plaintiff be free to attend forthcoming sittings of the Dewan Rakyat without any hindrance or obstruction at the instance of the first defendant;

(h) interest on the adjudged sum on such rates and periods deem fit and proper by this honourable court;

(i) costs; and

(j) any further or other relief deemed fit and proper by this honourable court.

THE THRESHOLD ISSUE

[4] The primary issue that arises for consideration concerns the justiciability of proceedings within the Dewan Rakyat in the face of the seemingly clear provision of art 63(1) of the Federal Constitution which reads 'The validity of any proceedings in either House of Parliament or any committee thereof shall not be questioned in any court'. The parties here take diametrically opposing views on this issue. Counsel for the plaintiff, Mr Karpal Singh, grounded his submission on what he termed as the ratio decidendi of the landmark decision of the Federal Court in *YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener)* [2009] 4 MLJ 24, and this decision, according to counsel, has clearly declared that art 72(1) of the Federal Constitution must be read as subject to the existence of a power or jurisdiction of the courts of law, either inherent or express, to do whatever is necessary. This is how counsel pitched his general argument: 'Thus, the court is empowered to ascertain whether a particular power that has been claimed has in fact been provided for.' This submission draws on paras 46 and 47 of the Federal Court judgment which appears on p 59 of the report, and the relevant portions read:

> It follows that art 72(1) must be read as being subject to the existence of a power or jurisdiction, be it inherent or expressly provided for, to do whatever that has to be done. The court is empowered to ascertain whether a particular power that has been claimed has in fact been provided for. The issues raised by the applicants are therefore justiciable ...
>
> It now becomes necessary to ascertain whether there was any power to authorise the suspension of the applicants on account of the alleged contempt committed by them. As a starting point it is useful to refer to *Doyle v Falconer* ... where Colvile J said:

> The privileges of the of Commons, that of punishing for contempt being one, belong to it by virtue of the *lex et consuetuds Parliamenti*, which is a law peculiar to and inherent in the two Houses of Parliament of the United Kingdom. It cannot therefore, be inferred from the possession of certain powers by the House of Commons, by virtue of that ancient usage prescription, that the like powers belong to legislative assemblies of comparatively recent creation in the dependencies of the Crown ...

[5] Counsel impressed upon this court that the Federal Court decision, delivered by a strong bench of five judges, is obviously binding on this court. That being so, the issue of justiciability of proceedings of the House should be regarded as settled, but such an approach, with respect, begs the question of what exactly was decided by the Federal Court in *YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener)*.

[6] In their submission on behalf of the defendants, senior federal counsel Puan Azizah Nawawi and Mr Amarjeet Singh, took a more restricted view of the Federal Court decision, preferring to limit its ambit to cases where an alleged contempt was committed outside the House. As far as proceedings within the four walls of the House are concerned, these proceedings are beyond review by the courts of law. I quote the relevant part of their written submission:

> We submit however, that since the motion, which consists of the contempt and punishment, has been debated and considered by the House, the whole process is protected by parliamentary privilege and immune from judicial review. There cannot be any severance of the remuneration from the suspension as the same was tabled in the motion itself ...

SEPARATION OF POWERS DOCTRINE

[7] It is necessary to add in this connection another argument advanced by counsel for the plaintiff, and this too can be said to be derived from the Federal Court decision. This additional argument relates to the doctrine of separation of powers. The Malaysian Parliament, it is argued, is not supreme; in Malaysian constitutional law the Constitution is supreme. Therefore, the doctrine of separation of powers, so it is argued, does not exist in the Federal Constitution. In the case of *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112, referred to in *Dato' Dr Zambry bin Abd Kadir*, Suffian LP said:

> The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The powers of Parliament and State Legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.

[8] Mr Karpal also called in support of his proposition another Federal Court decision — that of *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1 where the Federal Court stated:

> ... we have our own model. Our Constitution does have the features of the separation of powers and at the same time, it contains features which do not strictly comply with the doctrine. To what extent the doctrine applies depends on the provisions of the Constitution. A provision of the Constitution cannot be struck out on the ground that it contravenes the doctrine. Similarly no provision of the law may be struck out as unconstitutional if it is not inconsistent with the Constitution, even though it may be inconsistent with the doctrine. The doctrine is not a provision of the Malaysian Constitution even though no doubt, it had influenced the framers of the Malaysian Constitution, just like democracy. The Constitution provides for elections, which is a democratic process. That does not make democracy a provision of the Constitution in that where any law is undemocratic it is inconsistent with the Constitution and therefore void (at pp 16–17 of the report).

[9] Mr Karpal again impressed upon me the bindingness of this Federal Court decision to the effect that the doctrine of separation of powers is not a provision of the Malaysian Constitution, and therefore this court is now 'freer' to examine what was resolved in the Dewan Rakyat on the facts of this instant case.

[10] With respect, I must differ with counsel on this conclusion. The doctrine of separation of powers is a feature of our Constitution, and that is recognised even in *Kok Wah Kuan*. It could not have been the intent of the Federal Court in *Kok Wah Kuan* to completely deny the relevance of the separation of powers doctrine, and as the passage quoted above clearly indicates, the Federal Court in fact did not so deny. Separation of powers, in the more readily understandable sense of checks and balances within the three branches of government, exists and animates the Constitution of Malaysia. Article 63(1) of the Federal Constitution is but one instance of its application.

THE RATIO DECIDENDI IN *DATO' DR ZAMBRY*

[11] I am obviously bound by the decision in *Dato' Dr Zambry*. What is the exact ratio decidendi of the case can only be fully understood after analysing the factual matrix and the applicable legal propositions within this context. I now turn to the facts of this landmark decision.

[12] Dato' Dr Zambry, as the first applicant in the case, had been sworn in as the Menteri Besar of Perak in place of YB Dato' Seri Nizar Jamaluddin, whereupon the former proceeded to appoint his Executive Council Members

who were the second to seventh applicants in that case. An assemblyman lodged a complaint with the Speaker of the State Legislative Assembly of Perak to complain that the applicant had committed acts of contempt against the State Legislative Assembly of Perak. Based on this complaint the respondent, at that time the Speaker of the Perak State Legislative Assembly, issued a summons under Standing Order 72 of the Perak State Assembly Standing Orders. That Standing Order required the applicants to attend before the Committee of Privileges to answer a charge of a breach of privileges arising from the alleged acts of contempt committed by them. To be precise, the alleged acts of contempt were that the first applicant wrongly held himself out as the Menteri Besar of Perak and that he acted illegally by appointing the other applicants as members of the Executive Council. It was alleged that the applicants wrongly held themselves out as the Menteri Besar and Executive Council Members contrary to the provisions of the Perak State Constitution, since the legally appointed Menteri Besar of Perak and his executive committee members were still in office. The Committee of Privileges found the applicants were guilty of the charges of contempt and suspended the applicants from attending the sessions of the State Assembly for a period of time — 18 months for Dato' Dr Zambry, 12 months for the other applicants. The applicant filed originating summons in the High Court, and subsequently a notice of motion in the Federal Court to have determined certain questions pursuant to art 63 of the Perak State Constitution. The applicants argued that their suspensions from attending the State Legislative Assembly were null and void. The respondent, YB Sivakumar, who was then the Speaker of the State Legislative Assembly, then submitted that the issues raised by the applicants were not justiciable in the light of art 72 of the Federal Constitution and the Legislative Assembly (Privileges) Enactment 1959 of Perak. It was in this context that the Federal Court held art 72 of the Constitution must be read as being subject to the existence of a power or jurisdiction, either inherent or express, to do whatever is necessary.

[13] I pause here to consider the wording of art 72:

> (1) The validity of any proceedings in the Legislative Assembly of any State shall not be questioned in any Court.
>
> (2) No person shall be liable to any proceedings in any Court in respect of anything said or any vote given by him when taking part in proceedings of the Legislative Assembly of any State or of any committee thereof ...

[14] It is to be noted that art 72(1) mirrors art 63(1), except that in art 63(1) the additional words 'or any committee thereof' appear. In full art 63(1) reads 'the validity of any proceedings in either House of Parliament or any committee thereof shall not be question in any court'.

[15] Despite the imperative wording of art 72, the Federal Court held that provision to be subject to the existence of a power or jurisdiction, either inherent or express, to do whatever is necessary. From this premise, it was held that the court was empowered to ascertain whether a particular power that was claimed had in fact been provided for. On the facts of *Dato' Dr Zambry*, the Federal Court concluded that the alleged acts of contempt, namely the holding out as Menteri Besar of Perak and the holding out as Executive Council Members, were acts which were committed beyond the walls of the Legislative Assembly, but these acts, said to constitute contempt, had not been specifically provided for either under Standing Order 72 or the Enactment. At para 57, p 64 of the report, this relevant passage appears:

> Standing Order 72(1) authorises the Committee of Privileges to take cognizance of '... any matter which appears to affect the powers and privileges of the Assembly ...' In order for a '... matter ...' to have such an effect it must be unlawful or be an infringement of the powers and privileges of the Assembly. It is only then that it can be said that it appears to affect the powers and privileges of the Assembly. The summonses against applicants state that their acts constitute contempt. As contempt has not been specifically prescribed for, the acts cannot come within the ambit of Standing Order 72(1). Even the Legislative Assembly (Privileges) Enactment 1959 elected by the Perak Legislative Assembly does not contain any provision for the offence of contempt and its punishment. By way of contrast reference must be made to the House of Parliament (Privileges and Powers) Act 1952 which makes specific provision for contempt.

[16] This passage is important for purposes of this instant application because of the reference to the House of Parliament (Privileges and Powers) Act 1952, and the express recognition that the Act makes specific provisions for contempt. I will revert to this important observation later.

[17] On a proper reading of the judgment in *Dato' Dr Zambry*, the Federal Court recognised an overriding power of the courts to question whether there is a legal basis for an act of the Legislative Assembly to suspend an assemblyman for an alleged specific contempt. The alleged contempt on the facts of *Dato' Dr Zambry*, as we have seen earlier, related to acts committed beyond the walls of the State Legislative Assembly, for which there was no provision either under the Perak State Constitution, the Standing Orders of the Legislative Assembly or the Enactment of 1959. Such was the immediate context of the case, and therefore any ratio decidendi to be derived from the case has, to my mind, to be accordingly limited. I do not believe this case can be read as laying down the broadest possible proposition that all acts of the State Legislative Assembly, or the Houses of Parliament, must be open to judicial scrutiny and correction. To extend the principle thus far will render meaningless the wordings of art 72(1) and art 63(1). It should be noted that both art 72(1) and art 63(1) refer to the 'validity' of proceedings, and that

'validity of proceedings' shall not be questioned in any court. If proceedings in the House has constitutional or legal support, it must be immune from legal challenge. Conversely, if such proceedings do not have such validation, it can be challenged. Further, the court of law when call upon to adjudicate such a dispute can enquire whether a particular privilege or power of the House exists, and test its legality. If the privilege or power exists as a matter of law, either by way of a specific constitutional provision or as provided under ordinary law, the court cannot question such privilege or power of the House. This view, I might add, is fully in accord with the common law position.

THE COMMON LAW POSITION

[18] The common law position is accurately stated by the learned commentators of Bradley and Ewing, *Constitutional and Administrative Law* (14th Ed, 2007), and I quote:

> Privilege is an important part of the law and custom of Parliament, but aspects of the law are still obscure. It has been developed over centuries by the response of Parliament, especially the Commons, to changing circumstances and also, since privilege affects those outside Parliament, by decisions of the courts... when a matter of privilege is disputed, 'it is for the courts to decide whether a privilege exists and for the House to decide whether such privilege has been infringed'. ...

[19] In this context, Puan Hajah Azizah Haji Nawawi, senior federal counsel, usefully reminded the court of the ringing words of Lord Coleridge CJ in *Bradlaugh v Gossett* (1884) 12 QBD 271, which are as relevant today as they were more than 120 years ago, where it was said 'the jurisdiction of the houses over their own members, their right to impose discipline within their walls is absolute and exclusive'. To use the words of Lord Ellenborough, 'They would sink into utter contempt and inefficiency without it' (at p 275 of the report).

[20] As far as the offence of contempt of the House is concerned, the categories are extremely wide. *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (23rd Ed, 2004) states:

> Generally speaking, any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results, may be treated as a contempt even though there is no precedent of the offence. It is therefore impossible to list every act which might be considered to amount to a contempt, the power to punish for such an offence being of its nature discretionary ... Nevertheless, certain broad principles may be deduced from a review of the kinds of misconduct which in the past either House has punished as a contempt ...

... Any disorderly, contumacious or disrespectful conduct in the presence of either House or a committee will constitute a contempt, which may be committed by strangers, parties or witnesses ...

[21] Contempt of the House, as exhaustively analysed by *Griffith and Ryle on Parliament — Functions, Practice and Procedures*, includes cases of misconduct by members such as deliberately misleading the House or corruption, obstructing witnesses, premature disclosure of committee proceedings, and includes attempted intimidation of members. See p 137 of the commentary.

[22] It bears repeating that the long list of instances of contempt are to be related to the right of the House 'to impose discipline within its walls' (*Bradlaugh v Gossett*).

THE MALAYSIAN POSITION

[23] At this juncture, it is necessary to clarify the relevance of the common law position on Parliamentary Powers and Privileges in the Malaysian constitutional context. No doubt the fundamental constitutional principle in Malaysia is that of supremacy of the Constitution, not supremacy or sovereignty of Parliament. However, the Malaysian Parliamentary System is modelled on the so called Westminster System (namely, the British Parliamentary System) and that being so, the general principles and usages of the Westminster. Parliamentary System are not entirely irrelevant to resolve any ambiguity, except where the provisions of the Federal Constitution or State Constitution, or any local law, do not allow any reliance on these principles and usages. Nevertheless, the first point of Constitutional reference must be the Malaysian Constitution and Malaysian Law. In *Dato' Dr Zambri*'s case this first point of reference leads to a conclusion that the specific alleged act of contempt is not provided for, and as such the purported suspension of the assemblymen could be challenged and declared null and void.

[24] Applying the same principles, can it also be said that the alleged act of contempt by the plaintiff in this instant case can likewise be challenged and declared null and void by the court on the ground that there has been no specific provision for it? As I indicated earlier, the answer must lie first and foremost in provisions of the Malaysian Constitution and local law. With due respect to plaintiff's counsel, I am not persuaded that the answer can be found in the Standing Orders merely. The basic constitutional provision, aside from art 63(1), is art 62(1) which states 'Subject to the provisions of this Constitution and Federal Law, each House of Parliament shall regulate its own procedure'. The Standing Orders are thereby made under this

constitutional provision. Mr Karpal is of course correct when he submitted that clearly the Standing Orders basically provide only for procedure, and that the provision for offences and penalties are provided by federal law. The relevant law in this connection is the Houses of Parliament (Privileges and Powers) Act 1952, a fact also accepted by counsel. The question then becomes: Has the plaintiff committed contempt by accusing another MP of complicity in a murder case, the accusation being made on the floor of the House? If it has been so provided for, the proceedings of the House must be immune from judicial review by virtue of art 63(1) of the Federal Constitution; if it has not been provided for, this court will be bound by the decision in *Dato' Dr Zambry* to inquire into these proceedings and nullify the decisions by the House. The related question of the punishment imposed falls to be decided on the same basis.

THE HOUSE OF PARLIAMENT (PRIVILEGES AND POWERS) ACT 1952

[25] The only direct express provision on contempt of the House appears in s 9 of the Houses of Parliament (Privileges and Powers) Act 1952 ('the 1952 Act'), headed 'Power of the House to punish for contempt of the House'. Fourteen specific offences of contempt are listed, to include 'assaulting, obstructing, or insulting any member coming to or going from the House ...'. For these offences, the House is provided with a summary power to punish with a fine not exceeding RM1000, or if payment of the fine be not immediately paid, the offender can be committed into custody.

[26] It is clear from the terms of s 9 that it relates to a summary power to punish for contempt. It is silent on the punishment of suspension from the service of the House or the withholding of allowances and other entitlements. Can it therefore be said, as submitted by the plaintiff, that the relevant motion here is null and void?

[27] The power to suspend, and even to expel, for contempt of the House exists at common law. Is it the position in Malaysia that there exists only a summary power to fine or to commit into custody if the fine is not paid? I must say this will be an alarming conclusion if it were correct Parliament in its collective wisdom has, in addition to s 9, provided broader powers through ss 32 and 33 of the 1952 Act.

[28] Through ss 32 and 33, the privileges, immunities and powers of the Houses of Parliament are enlarged by the device of incorporating the like privileges, immunities and powers of the House of Commons as existing on the date of coming into force of any law of Malaysia defining such privileges,

immunities and powers. By s 33, such privileges, immunity and powers shall be part of the general and public law of Malaysia.

[29] To quote s 32(1) in full:

> Save as is otherwise expressly provided by this Act, the House and the members thereof respectively shall hold, enjoy and exercise such and the like privileges and immunities, and powers relating thereto as are held, enjoyed and exercised by the Commons House of the Parliament of the United Kingdom and by the members thereof and also such privileges, immunities and powers as are from time to time defined by any law of Malaysia but not exceeding those at the commencement of such law held, enjoyed and exercised in the Commons House aforesaid and by the members thereof respectively whether such privileges, immunities of powers were so held, possessed or enjoyed by custom, statute or otherwise.

[30] The conduct of the plaintiff on the floor of the House, on the facts of this case, falls *within* the definition of contempt under s 9 of the 1952 Act, but, as seen earlier, this section merely provides for a summary power to punish for contempt. However, this conduct would in my opinion also fall within the list of offences constituting contempt of the House at common law. By virtue of ss 23 and 32, such conduct will also constitute an offence of contempt of the House and punishable as such. Once it is determined that the conduct falls within the definition of contempt of the House, and it is therefore supported by a legal basis, the proceedings of the House in this matter must be regarded as immune from judicial review by operation of art 63(1) of the Federal Constitution. Likewise, the punishment to be meted out by the House for this offence. At common law the punishment of suspension, or even expulsion, of a member is well established. By the same token, the motion and resolution resulting in the suspension of the plaintiff from the House for 12 months must be taken as having a proper legal basis and therefore also immune from judicial challenge. However, the motion and resolution also contain the punishment of withholding of his allowance and entitlements as a Member of Parliament. If there is legal foundation and support for this motion and resolution, it will be likewise not open to challenge. The issue that has to be decided in this connection is whether there is any legal provision providing for such a punishment. The remuneration of a Member of Parliament is governed by an Act of Parliament, Members of Parliament (Remuneration) Act 1980 (Act 237), passed under art 64 of the Federal Constitution which provides 'Parliament shall by law provide for the remuneration of members of each House'. The language is imperative, and understandably so, because, as stated by the Federal Court in *Datuk Ong Kee Hui v Sinyium Anak Mutit* [1983] 1 MLJ 36. 'In providing remuneration for its Members of Parliament intends to provide them with a decent subsistence to enable them to carry out the duties free from any temptation of abusing the political powers and influence in order to acquire wealth'. In the

particular context of this Federal Court decision, it was also said 'an undertaking whereby a member is deprived of the remuneration is clearly against public policy as it would be hard for him to function effectively as a Member of Parliament without financial worries' (at p 39 of the report). Unless there is an express law allowing for this withholding which has been passed, or a clear power or privilege of the House of Commons existing at the date of commencement of the 1952 Act, this particular decision to withhold the plaintiff's allowances and entitlements can be open to challenge. Counsel for the defendants have submitted that in the United Kingdom the withholding of a member's allowance has become an automatic consequence of suspension since the passing of Standing Order No 45A which was passed in 1998, which means to say there had to be an express addition to the Standing Orders of the House of Commons to allow expressly for the withholding of remuneration as an automatic consequence of suspension. In the circumstances and on the evidence, it thus appears that there is no legal power to allow the withholding of a Member's allowances and entitlements as the date of coming into force of the 1952 Act. This punishment would seem not to fall within the categories of contempt regarded as of 'ancient usage' of the House of Commons. In any event, the 1952 Act, being an ordinary Act of Parliament, has to be read as subject to the imperative provision of art 64 of the Federal Constitution which requires Parliament to provide by law for the remuneration of members. Such a Constitutional protection for Members of the House cannot surely be simply displaced in the absence of clear law to allow any withholding of Member's remuneration and entitlements.

STANDING ORDER 43

[31] By way of completeness I need to refer to the point made in the course of submission by Mr Karpal that the motion in relation to the suspension should be regarded as bad because the Standing Orders do not allow the plaintiff to be suspended as a Member of Parliament but merely to be suspended from the service of the House. In my view this issue is merely one of form and not substance. The effect of the motion and a resolution in this connection is suspension from the service of the House. In point of fact the plaintiff's position as Member of Parliament for Puchong remains unaffected.

[32] This issue has been raised since Standing Order 43(3) sets out the procedure on the suspension of a member 'from the service of the House' by 'naming' the member in the form and manner prescribed:

> I hereby name the Honourable Mr ...

[33] The 'naming' is by the Chair in the circumstances mentioned. Once this procedure is commenced, the Standing Order requires a Minister to thereafter rise and propose, and another Minister to record a motion which has to read as follows:

> That the House hereby resolves that Mr ... be suspended from the service of the House until (date).

[34] The Bahasa Malaysia equivalent reads:

> Bahawa Majlis Mesyuarat dengan ini memutuskan bahawa Tuan ... digantung daripada perkhidmatan Majlis Mesyuarat ini sehingga (tarikh).

[35] Properly read, such provisions are clearly matters of form relating to proceedings of the House which should be immune from judicial review so long as the power to punish for contempt for the particular offence exists. In any event, the width of the Standing Order, as to matters of form and internal proceedings can be additionally appreciated by looking at a subsequent provision, namely Standing Order 44(8) which reads:

> Nothing in this Order shall be taken to deprive the House of the power to fake action against any person, including a non member, in accordance with any resolution of the House.

CONCLUSION

[36] By reason of the above, I am of the view, and so I hold, that the proceedings of the House in passing the motion to suspend the plaintiff from the House for a period of twelve months cannot be questioned by this court by virtue of art 63(1) of the Federal Constitution, and therefore dismiss prayers 1, 2, 4, 5 and 7 of the originating summons.

[37] As for prayers 3 and 6, this court allows the prayer for a declaration that the plaintiff is entitled to remuneration and other benefits constitutionally granted to him under art 64 of the Federal Constitution pursuant to Members of Parliament (Remuneration) Act 1980 (Act 237), and it is further ordered that an account be taken of all allowances, emoluments and other benefits the plaintiff is entitled to and that the same be paid to him forthwith with interest thereon at the rate of 8%pa from due date until full payment.

[38] Given the importance of the subject matter to both parties and the issues raised are of public interest, it will be fair in the circumstances not to make any order as to costs.

[39] No order as to costs.

Plaintiff's application allowed in part with no order as to costs.

Reported by Andrew Christopher Simon